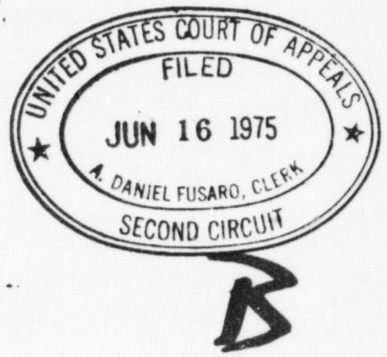
United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

EVG



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

In the Matter of :

M. E. GREEN CO., INC. :

----------x

Docket No. 75-5009

75-5009

APPELLANT'S MEMORANDUM

Alex L. Rosen, Esq.
Attorney for Appellant
Office and P. O. Address
225 Broadway
New York, N.Y. 10007
(212) BA 7-1787

I.

APPELLEES HAVE WAIVED THE RIGHT TO QUESTION STANDING OF APPELLANT

The arguments advanced by appellee Michael Green in support of its motion to dismiss are specious.

The simple proposition asserted would if carried to its logical conclusion, mean that a trustee's compromise could not be appealed by anyone. Obviously, that is not and cannot be the law and no case so holds.

Appellant, a general creditor of the estate, on receiving the required notice of compromise pursuant to §58 of the Bankruptcy Act filed objections to its proposed terms and participated in a hearing directed to the properiety of such compromise.

At a continued compromise hearing, appellant requested an adjournment, which application was denied by the Bankruptcy Judge who then closed the hearing although he permitted the trustee to submit such additional documentation or exhibits as he desired without an actual hearing taking place or being conducted.

Subsequently, the trustee submitted proposed Findings of Fact and Conclusions of Law which were adopted in full by the Court in its order of approval having made no

independent inclusions therein.

It is noteworthy that, despite appellee's "red herring" use of the word "default" nowhere in the findings is there any such mention. Indeed, the only such reference contained in Paragraph 28 of the Findings stated as follows:

> "At that hearing the Trustee testified in support of the Proposed Settlement Agreement. The Objectant conducted a partial cross-examination of the Trustee and conducted and completed his examination of Michael Green. After further adjournments at the request of the Objectant, the hearing was continued on December 19, 1974, although the Objectant sought yet another adjournment at that time and, upon the denial of his request, elected not to participate further."

The Conclusions of Law signed by the bankruptcy Judge stated nothing as to the foregoing and said nothing about a default.

Since a compromise hearing is not an adversary proceeding, there can never be a "default" in the sense that appellee uses the word and therefore both his facts and his focus are entirely incorrect. Furthermore, appellee attempts to mislead the court by his contention that appellant herein was the sole creditor to object to this compromise. The truth of the matter is as supported by the record that at least two other creditors, Mr. Paul Nehrung and Mr. M.G. Meldon were refused leave to file late objections.

Mr. Nehrung, a creditor with a claim in excess of over $100,000 traveled all the way from Chicago on numerous occasions to vociferously oppose this settlement agreement. It is significant that if the claims of parties who are directly involved in this compromise agreement and thus have a special interest in its approval, were to be deducted from the total claims against the estate, the remaining claims of the appellant and the other oral objectants would represent a substantial percentage of the outstanding claims.

Appellant, in disagreement with the decisions of the Bankruptcy Court, obtained first an order of the Bankruptcy Court extending appellant's time to appeal to the District Court and then did, in fact appeal to the District Court. Of great significance is the fact that appellees moved the District Court to dismiss the appeal therein on the very same grounds of alleged "default" which the Honorable Judge,Milton J. Pollack, denied without discussion. Appellees have failed to appeal from the decision of Judge Pollack and have therefore foreclosed their ability to do so now. The District Court, by Judge Inzer B. Wyatt, affirmed the decision below, granted a stay of execution of the Agreement and further granted an extension of that stay on a subsequent occasion and appellant now appeals to this Court.

It is noteworthy that neither the Bankruptcy Judge nor the District Court questioned appellant's standing to appeal even though that issue was raised in the District Court.

II.

THE FACTS OF THIS PROCEEDING MANDATE APPELLANTS STANDING TO APPEAL

Dispositive of the question of standing is the case of Connelly v. Hancock, Dorr, Ryan & Shove, et al., 2d Cir., 195 F.2d 864 (1952). In that case, a general creditor appealed from a compensation allowance to counsel for the trustee and others. The appellees contended that the general creditor had no standing to prosecute such an appeal without first requesting the trustee to do so or securing the permission of the District Judge. The Court quite properly stated that such a rule would not bar the attack on the allowance to the trustee's own counsel although it normally would apply to the other portions of that appeal.

Clearly, the Court recognized the futility of a general creditor requesting a trustee to appeal from an allowance to his counsel which he, in fact, recommended. The compromise and issue in the case at bar is also one negotiated by and recommended by the trustee and it would be the height of foolishness to assume that a general creditor could or should convince the trustee to appeal from a decision which he recommended and has a special interest in.

As further evidence of appellant's contention that any request to the trustee that he appeal from his own proprosed compromise would be a nullity, it is necessary to state some of the underlying facts of the bankruptcy proceeding.

In April of 1974 predecessor counsel to appellant moved for an order disqualifying the trustee on the grounds that he was an officer and general counsel of a subsidiary of Engelhard Mineral and Chemical Corporation, a claimant which received a preference from the bankrupt in a sum approximating $700,000. Simultaneously, predecessor counsel moved for the disqualification of the trustee's special counsel on the grounds that they had acted as counsel for Engelhard on prior matters. Examination of the trustee revealed that he had knowledge of the insolvency of the bankrupt prior to any filing in the bankruptcy court, that he had participated in and directed the transfer of funds in excess of a quarter of a million dollars from the bankrupt to Engelhard and that at various times during his examinations he had changed his testimony with respect to these facts.

The ultimate facts elicited demonstrated that the trustee had met with Michael and Harry Green and other

officers of Engelhard, at which time Michael Green advised them that M.E. Green Co., Inc. was insolvent and that based on that information the trustee advised the bankrupt not to pay any creditors but instead caused Engelhard to draw on a $200,000 Letter of Credit from the bankrupt, in addition to receiving a check for $180,000. The Statute of Limitations on these preferences claimed by the bankrupt estate has long since run due to the dereliction of the trustee and his counsel. It is clear that conflict of interest precluded any meaningful investigation or action by the trustee with respect to such preference.

Another peculiarity of the proposed compromise was that it included the settlement of a plenary action pending in the Supreme Court of the State of New York wherein Harry Green sued Engelhard for $200,000, in which action a verified answer of Engelhard asserted counterclaims charging Mr. Green with various acts of dereliction and fraud as an officer and director of the bankrupt with respect to its dealings with Engelhard. The settlement of that action, which provided for the payment of the sum of $10,000 to Harry Green was expressly conditioned upon the acceptance and approval of the trustee's compromise in

the bankruptcy proceeding and if such approval was not obtained, the settlement of the plenary action was to be null and void. Appellant raised the issue of why a settlement of an action not relating to the bankruptcy proceeding was tied to the bankruptcy compromise since the obvious conclusion was and is that the trustee was seeking to benefit his employer Engelhard, and placing its interests before those of the bankruptcy estate.

These are but two of the instances of the conflict of interest of the trustee which make it obvious that an objecting general creditor must have the right of appeal in order to prevent a fraud upon the court and all general creditors by a trustee who serves his personal employer before the bankrupt estate. These situations and others of similar import will be fully outlined in a memorandum submitted with respect to the merits of the appeal and are set forth herein merely to demonstrate that it would be irrational to assume that the trustee would respond to any general creditor request to appeal from his proposed compromise.

III.

APPELLEE RELIES ON
INAPPLICABLE STATUTE

The appellee bases his entire "standing" argument on Bankruptcy Act §25, a section which was superseded in 1968 by Federal Rules of Appellate Procedure 4(a) and 6.

Indeed, the appellee further ignores the application of Sections 39(c) and 58(a) (6), the latter providing for notice to creditors of any proposed compromise, and the former detailing the manner of appeal from an order of a Bankruptcy Judge, the very procedure followed by appellant herein. Certainly, implicit in Bankruptcy Judge Ryan's signing an order extending appellant's time to appeal and the order of District Judge, Inzer B. Wyatt, extending appellant's time for a stay, is a recognition of appellant under Section 39(c). These actions would be otherwise inexplicable.

Secondly, the Court in Connelly v. Hancock, et al, supra, in discussing this issue stated:

> "This issue [standing to appeal] was, however, raised on an early motion to dismiss the appeal, which was denied on October 23, 1951, by a different panel of this court. While no opinion was filed, it appears that the court had before it a showing of implied consent by the district judge in granting permission to extend the time for appeal. Accordingly, we are not disposed to reopen the issue now." P. 867.

Again, the very same situation pertains in this case. Both the Bankruptcy Judge and the District Court Judge knew of the issue of standing and impliedly acknowledged by their actions that appellant was properly before the Court.

If therefore, we eliminate the false issues of default and standing, what is left.

Certainly, the appellee does not seriously contend that a general creditor does not have sufficient interest in a trustee's proposed compromise to object to such compromise since absent such authority such compromises would be completely non-reviewable. Under such circumstances, a request to the trustee would be the epitome of naivete.

What remains is the appellees argument that the settlement funds pursuant to the compromise are being held in escrow at a loss of interest to the respective parties entitled thereto. Since appellees counsel is also the escrow agent, it would seem that both he and counsel for the trustee could and should have provided the very normal and appropriate provision for placement of such funds in interest bearing instruments and can still do so if they so choose. Their failure and neglect has no place in this appeal proceeding.

IV

THE STATUTORY PROVISIONS OF BOTH THE BANKRUPTCY ACT AND THE FEDERAL RULES OF APPELLATE PROCEDURE MAKE ABUNDANTLY CLEAR THAT THIS IS AN APPEAL AS OF RIGHT AND NO APPLICATION NOR ALLOWANCE FOR SUCH APPEAL IS REQUIRED.

It is respectfully brought to the attention of this court that there is no provision in either the Bankruptcy Act or the Federal Rules of Appellate Procedure (F.R.A.P.) for seeking an allowance or application to appeal in this type of proceeding.

The statutes which control this subject clearly specify when such allowance or application be required.

To wit: Section 24(a) of the Bankruptcy Act which confers jurisdiction upon the appellate courts provides:

> "§ 24. Jurisdiction of Appellate Courts. (a) The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court". [Emphasis added]..

F.R.A.P. Rule 3(a) states in pertinent part:

> "(a) Filing the Notice of Appeal.
> An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.....Appeals by permission under 28 U.S.C. Sec. 1292 (b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively."

The highly respected commentary in Moores Federal Practice Volume 9 (1973) Rule 3, Par. 203.03 at p. 708, commenting on appeals taken as of right states:

> "Rule 3 prescribes the filing of a notice of appeal in the district court as the procedure for taking '[a]n appeal permitted by law as of right from a district court to a court of appeals.' An appeal is permitted by law as of right if the statute that authorized the appeal does not require the permission of the rendering or reviewing court as a prerequisite to taking the appeal. In fact, virtually all judgments and orders that are appealable at all are appealable as of right. Only appeals under 28 USC § 1292(b), appeals from certain orders in bankruptcy proceedings, and possibly, appeals in prize cases require permission or allowance. The procedure for seeking permission to appeal under 28 USC § 1292 (b) and for seeking allowance of an appeal when allowance is made a prerequisite by the Bankrupcy Act i, as the final sentence of Rule 3(a) provides, prescribed by Rule 5 and Rule 6 respectively. (Emphasis added)

Paragraph 203.05 at p. 714 of the same volume of Moores in defining Appeals by permission or allowance clearly shows that an appeal by permission only pertains to appeals

from interlocutory orders as opposed to the final order appealed from herein and then continues:

> "With one possible exception, appeals that require allowance of a court of appeals are confined to bankruptcy proceedings. The Bankruptcy Act, while authorizing most appeals in bankruptcy proceedings to be taken as of right, provides that appeals from judgments and orders involving less than $500, and from orders making or refusing to make allowances of compensation or reimbursement in Chapter X and Chapter XII proceedings must be allowed by a court of appeals before they can be prosecuted." (Emphasis added).

Thus a reading of the relevant statutes makes it abundantly clear that the appeal taken herein is one as of right and no application for permission or allowance need be taken.

CONCLUSION

For the reasons set forth above and the serious nature of the issues involved it is respectfully requested that this appeal be determined on the merits and that the appellees motions be in all respects denied.

Respectfully submitted,

Dated: New York, N.Y.
June 16, 1975

Alex L. Rosen
Attorney for Appellant
Harry Silverman
225 Broadway
New York, New York 10007
212-227-1787